SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2019 0216

HON WING LAU — Applicant

v

THE QUEEN — Respondent

JUDGES:	MAXWELL P and SIFRIS JA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	31 May 2021
DATE OF JUDGMENT:	11 June 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 162
JUDGMENT APPEALED FROM:	[2019] VCC 1091 (Judge Parrish)

CRIMINAL LAW – Appeal – Sentence – Parity – Attempt to possess commercial quantity of a substance reasonably suspected of having being unlawfully imported (1 charge) – Applicant sentenced to 8 years' imprisonment with 5 years 6 months non-parole – Low level involvement by applicant in importation of two consignments – 5.9 times commercial quantity of methamphetamine – Co-offender sentenced for importing commercial quantity of border controlled drug (2 charges) – Sentenced to 12 years 9 months' imprisonment with 8 years 4 months non-parole – Co-offender participated at very high level in importation of four consignments – 11.8 times commercial quantity of methamphetamine – Crown concession – Offences of significantly different seriousness – Need for much greater differential between co-offenders' sentences – Leave granted – Appeal allowed – Applicant resentenced – Total effective sentence of 5 years' imprisonment with 3 years non-parole.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Ms G Connelly	Valos Black & Associates
For the Respondent	Ms K Breckweg	Ms A Pavleka, Solicitor for Public Prosecutions (Cth)

MAXWELL P
SIFRIS JA:

Summary

1 The applicant ('HWL') pleaded guilty to one charge of attempting to possess a commercial quantity ('CQ') of methamphetamine, being 'a substance … reasonably suspected of having been unlawfully imported'.[1] He was sentenced to 8 years' imprisonment, with a non-parole period of 5 years and 6 months.[2]

2 The attempt to possess related to two consignments of drugs. The applicant provided to his co-offender, Lam, his home address for the delivery of the first consignment and his work address for the delivery of the second. The total amount of pure methamphetamine the subject of the charge was 4,409 grams (4.41kg), which represented 5.9 times CQ for methamphetamine.

3 Lam, who had earlier been sentenced by a different judge (Judge Lyon), was found to have participated 'at a very high level' in the importation of methamphetamine.[3] He pleaded guilty to two charges of importing a commercial quantity of the drug, each involving two consignments. The total quantity of pure methamphetamine which Lam imported was 8.8kg, representing almost 12 times CQ. He was sentenced to a total effective sentence of 12 years and 9 months' imprisonment, with a non-parole period of 8 years and 4 months.

4 The applicant's principal complaint concerned the misapplication of the principle of parity. He contended that, given his very limited role — confined to the provision of two addresses for delivery of the drugs once imported — there should have been much greater differentiation between the sentence he received and the sentence imposed on Lam, who had played a very significant role in the importations.

1 Contrary to ss 11.1(1), 11.2A(1) and 307.8(1) *Criminal Code Act 1995* (Cth).

2 *DPP (Cth) v Lau* [2019] VCC 1091 ('Reasons').

3 *DPP (Cth) v Lam* [2018] VCC 1655, [9] ('Lam Reasons').

5 In the course of the hearing of the application, counsel for the Commonwealth Director of Public Prosecutions conceded that the parity complaint should be upheld and the applicant resentenced. For reasons which follow, we concluded that the concession was properly made and should be accepted. We indicated that leave to appeal would be granted and the appeal allowed, but reserved the question of resentencing.

6 In our view, the restoration of reasonable relativity between the sentences of the co-offenders requires a reduction of HWL's sentence to 5 years' imprisonment, with a non-parole period of 3 years.

Factual background

7 HWL's offending related to two consignments of methamphetamine, one from the United States (intercepted by the authorities in November 2016) and the other from Malaysia (intercepted in May 2017). As noted earlier, the total amount of pure methamphetamine in the two consignments was 4,409 grams. A commercial quantity of methamphetamine being 750 grams pure,[4] the amount in the two consignments represented 5.9 times CQ.

8 HWL's role was very limited. As the judge found, his role was to 'search out and provide addresses to which the consignments could be sent'.[5] He acted on instructions from Lam, who agreed that he should be paid $3,000 for the provision of the addresses ($1,500 per address).

9 The nature of HWL's participation was to be discerned from the intercepted telephone conversations between himself and Lam, which spanned the period October 2016 — May 2017. As summarised in the prosecution opening, those conversations revealed — and counsel for HWL accepted — that he knew he was being asked to provide addresses for the delivery of methamphetamine which was

[4] Schedule 4 *Criminal Code Regulations 2002* (Cth).

[5] Reasons [56].

to be imported and which, once received in Australia, would be trafficked (by others). On one occasion, in March 2017, HWL said to Lam, 'I gave you two addresses, to receive, I was scared to, but I didn't get paid'. HWL received no payment at any time.

10 As counsel for HWL pointed out on this application, Lam informed HWL that, once the first consignment had arrived, he would get somebody to pick it up. When HWL asked whether he might be paid more if he brought the drug to Lam, he was 'discouraged' from doing that. Later that month, HWL told Lam that the shop address was 'too risky' but that 'it doesn't matter when it is a home address'. At certain points, HWL gave Lam advice about how to minimise the risk of detection.

11 The consignments with which HWL was concerned formed part of a larger operation. In sentencing Lam, Judge Lyon described it as 'an international operation on a very large scale'.[6] As noted earlier, Lam pleaded guilty to two charges of importing a commercial quantity of methamphetamine. The first charge concerned the importation of two consignments, one in October 2016 and the other in November 2016. The total quantity was 3,235 grams of pure methamphetamine (4.3 times CQ). HWL was only involved with the second of those two consignments.

12 The second importation charge to which Lam pleaded guilty concerned another two consignments, this time in May 2017. Those two consignments contained a total of 5,590 grams of pure methamphetamine (7.45 times CQ). HWL's participation was, once again, confined to one of those consignments.

13 In the lead up to the May 2017 importation, Lam had participated in a 'dry run' in which sex toys were imported. According to the telephone intercepts, Lam told HWL in December 2016:

> [H]is boss will send three boxes of sex toys in the coming months to test the process, like how long Customs takes etc. Will have a trial run first, testing the Customs process, how long it takes to arrive, how long it takes to clear Customs, will try once or twice first.

[6] Lam Reasons [6].

14 Importantly, Lam then said to HWL:

> [T]hey will try a couple of times, but in the beginning, they do not need you to find addresses, they have someone here to open a company for them.[7]

In short, although HWL was aware of the 'trial run', he had no involvement in it.

15 In sentencing Lam, Judge Lyon found that he had directed his co-offenders, including HWL, 'to do certain things in progressing the importation'.[8] It was apparent, his Honour said, that they were 'required to follow your instructions'.[9] Furthermore, his Honour said, it appears 'you had some role in the distribution of the drug after its importation'.[10]

16 His Honour made the following findings about the gravity of Lam's offending:

> This was an international operation on a very large scale. You openly discussed your knowledge of the drug methylamphetamine, its price in Hong Kong and Australia per kilogram, the loss of the consignment and the cost of the loss to your boss; you spoke of your experience of delays in payments to participants, and of your expectation that this was an ongoing operation for years to come.
>
> Although it appears that the operation was financed by others, it seems that you received and had an expectation of high reward. There is no evidence that you were otherwise working once you left your hairdressing position in Tasmania to move to Melbourne. You said that you wanted to buy a Rolex watch at the end of one consignment. You told the co-offender that you wanted to make $80 to $100,000 from the business. The rental of a storage warehouse and an office says something of the scale and long-term business plan of this operation.
>
> Mr Lee, who appeared on behalf of the Commonwealth, submitted that you should be viewed as the Melbourne-based member of an international trafficking organisation and involved at the highest level in terms of the domestic operation. Ms Hancock, who appeared on your behalf, resisted such a classification.
>
> Ultimately, there is no need for me to make the precise classification urged by the Crown. From the observations I have already made about your role, each of which has been drawn directly from your intercepted conversations, it is possible to simply say that you were managing/coordinating the importation of a large amount of drugs into Australia and that you were to be rewarded for it. It follows from that that your participation in this offending was at a very high level.

7 Reasons [18].

8 Lam Reasons [2].

9 Ibid [3].

10 Ibid [4].

…

> I now turn to other aspects of the gravity of the offending. I note that overall, you managed the importation of over 8.8 kilograms of pure methylamphetamine. The overall purity of the drug to be imported was consistently at 80.3 per cent. This represents 11.5 times the threshold commercial quantity. The estimated street value of the total imported drug ranges from just over $2.7 million to just under $5.5 million. It is apparent from your conversation in respect to Charge two that you were aware of the approximate cost of the drug to the syndicate; and that kilos of it were being imported.
>
> This is drug importation on a significant scale by a sophisticated international operation. Your participation in the importations lasted over an approximate eight month period.[11]

The sentencing reasons

17 In the present case, the judge found that Lam was the person who had given HWL instructions. He described Lam as having been 'more involved in the attempt to import the methamphetamine to Australia.'[12] As noted earlier, his Honour accepted that HWL's role was 'to search out and provide addresses to which the consignments could be sent'.[13]

18 His Honour accepted the submissions of defence counsel that HWL did not have the capacity, financially or otherwise, to arrange the importation, and that he had no role to play in the planned distribution of the drugs. At the same time, his Honour found, HWL's motivation 'was purely a financial one'.[14]

19 His Honour was satisfied beyond reasonable doubt that HWL was aware of the contents of the imports. At the same time, his Honour said, there was no evidence that HWL knew either the weight of the methamphetamine in the consignments or its wholesale or street value.

20 His Honour then said:

> I consider that the gravity of your offending is high, in circumstances where,

11 Ibid [6]–[9], [11]–[12].

12 Reasons [56].

13 Ibid.

14 Ibid [59].

> *over a period of approximately seven months, you played an active role in the sourcing of property* in circumstances where you had an appreciation that methamphetamine was to be smuggled into Australia and ultimately distributed by others for profit. Clearly enough, although you clearly did not devise the importation scheme, nor had any contact other than with Lam, your role was important, as it permitted the consignments to be potentially sent to premises in the normal way that any package from overseas would be dealt with.[15]

21 As to HWL's role, we note that on the plea defence counsel disavowed any suggestion that it was 'an inconsequential role'. Counsel accepted that the part played by HWL was 'necessary for the conduct of the offending that is to be undertaken principally by the others'. According to the plea submission, the key considerations in sentencing HWL were his role, the weight of drugs imported and the sentence imposed on Lam.

22 As to those matters, the judge noted that the quantity of methamphetamine imported in the two consignments with which HWL was associated was 'nearly six times the commercial quantity'.[16] His Honour noted that the charges to which Lam had pleaded guilty had involved the importation of 3,235 grams and 5,590 grams respectively. His Honour then said:

> I clearly accept that the gravity of Lam's offending was more severe than the gravity of your offending. Lam was involved in four importations and played a guiding role in relation to those importations. In particular, the second charge involving 5,590 grams, was a significant amount of methamphetamine.
>
> However, in relation to the first charge of importation, although Lam was, more involved than you, the weight of the drug involved with your two importations is a third greater than the weight pertaining to the first charge faced by Lam.
>
> Of course, his Honour Judge Lyon made clear that he was cognizant of the principles of totality in arriving at an appropriate sentence. He ultimately accepted, as demonstrated by the sentence, that there must be a measure of cumulation to mark the overall criminal conduct of Lam.[17]

23 There was debate on the present application as to whether it was correct to describe HWL as 'involved in the importation' of the methamphetamine. As his counsel

15 Ibid [62] (emphasis added).

16 Ibid [53].

17 Ibid [75]–[77].

correctly pointed out, and as the judge noted, HWL was charged with attempt to possess an unlawfully imported drug. Further, as the judge found, HWL played no part in arranging or financing the importation and had no role in the intended distribution of the drug.

24 As a matter of ordinary language, however, it was accurate to describe HWL as 'involved in the importation'. As his counsel properly conceded, the delivery of the consignment to the addresses which HWL provided was a necessary step in the completion of the importation scheme. In that way, his provision of the addresses facilitated the importation of the drug, and he did so well knowing that that was its purpose.

25 At the same time, as counsel pointed out, the danger of describing HWL and Lam as both having been 'involved in the importation' — albeit to different degrees — was that it obscured the fundamental difference in their roles and, therefore, in the gravity of their respective offences. That is the issue to which we now turn.

Appropriate sentencing relativities

26 In *Green v The Queen*, the High Court said:

> 'Equal justice' embodies the norm expressed in the term 'equality before the law'. It is an aspect of the rule of law. It was characterised by Kelsen as 'the principle of legality, of lawfulness, which is immanent in every legal order.' It has been called 'the starting point of all other liberties.' It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*:
>
> > Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect.[18]
>
> Consistency in the punishment of offences against the criminal law is 'a reflection of the notion of equal justice' and 'is a fundamental element in any rational and fair system of criminal justice'. It finds expression in the 'parity principle' which requires that like offenders should be treated in a like

[18] Emphasis in original.

> manner. *As with the norm of 'equal justice', which is its foundation, the parity principle allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances*.[19]

27 When, as here, there is a complaint that the parity principle has been infringed, the question for determination is whether the sentencing relativities between the co-offenders were reasonably open to the sentencing judge in the circumstances of the case.[20] In this case, accordingly, the question is whether it was reasonably open to the sentencing judge to *fail to differentiate* between him and Lam, having regard to what he says were significant differences in the seriousness of their respective offences and in their respective levels of culpability.

28 The differences were, in our view, very significant indeed. First and most importantly, Lam was actively involved in arranging the importation of four consignments. As Judge Lyon found, his participation in the 'international operation on a very large scale' was 'at a very high level'.[21] He managed and coordinated the importations.

29 HWL, on the other hand, was involved at the lowest level. He fell to be sentenced on the basis that he had done no more than provide the addresses to which two consignments could be delivered. What HWL did was, as his counsel properly conceded, essential to the success of the importation but it was nevertheless participation of an altogether different character from Lam's.

30 HWL was, of course, aware of the purpose of the provision of the addresses but, given that awareness (or suspicion) of the fact of importation was an element of the possession offence to which he pleaded guilty, his awareness was not an aggravating factor of the offence. And, with respect to the sentencing judge, it was not correct to describe HWL as having 'over … seven months played an active role in the sourcing of property'.[22] Although there were intermittent conversations with Lam over that

[19] (2011) 244 CLR 462, 472–73 [28]; [2011] HCA 49 (French CJ, Crennan and Kiefel JJ) (footnotes omitted) (emphasis added).

[20] *Sinclair v The Queen* [2021] VSCA 144.

[21] Lam Reasons [6], [9].

[22] Reasons [62].

period, HWL only ever provided the two addresses — his home address and his work address. As we have pointed out, he had no role in the 'dry run'.

31 Secondly, there was a dramatic difference in the quantities with which HWL and Lam were respectively involved. Lam arranged the importation of four separate consignments, the total weight of which represented 11.8 times CQ of methamphetamine. HWL, on the other hand, facilitated the importation of only two consignments, the total weight of which represented 5.89 times CQ, approximately half of the quantity imported by Lam. As is well understood, sentencing for offences of importation is quantity-based and — other things being equal — the greater the quantity, the more serious the offending.[23]

32 Thirdly, although both offenders were motivated by financial gain, there was a dramatic difference in the scale of their expected rewards. As Judge Lyon noted, Lam had 'an expectation of high reward'.[24] He was recorded telling a co-offender that he wanted to make $80,000–$100,000 from the business. HWL, by contrast, stood to make $3,000 for providing the two addresses.

33 At the personal level, there was little to distinguish between them. Neither Lam nor HWL had any prior convictions; both had pleaded guilty, although not at the earliest opportunity; Lam faced the certainty of deportation and it was accepted that HWL would probably be deported. Both experienced hardship in custody because of language and cultural isolation. The only significant difference was that, while Judge Lyon found that Lam was genuinely remorseful, the judge in the present case found little evidence of remorse on the part of HWL.

34 The maximum penalty for importing a commercial quantity of a border-controlled drug is life imprisonment. Given the seriousness of Lam's offending — on the basis of his role and the total weight of methamphetamine imported — the total effective sentence of 12 years and 9 months may be thought to be lenient. No occasion arises,

[23] See, eg, *DPP (Cth) v KMD* [2015] VSCA 255.

[24] Lam Reasons [7].

however, to investigate that question.

35 As counsel for the Commonwealth Director properly acknowledged, there having been no appeal against Lam's sentence, it stands as the point of reference for the consideration of parity. As counsel further conceded, once the differences we have identified are appreciated, it is plain that there needed to be far greater differentiation in sentence between Lam and HWL. That is, it was not reasonably open to the judge to fail to differentiate to a greater extent between the co-offenders.

Conclusion

36 It was for these reasons that we accepted the respondent's concession that the parity ground must be upheld. In our view, the restoration of reasonable sentencing relativity between the co-offenders requires that HWL's sentence be reduced to 5 years' imprisonment, with a non-parole period of 3 years. Accordingly, there will be a grant of leave to appeal, the appeal will be allowed, the sentence below set aside and HWL resentenced accordingly.